Supreme Court, U.S.
FILED

051320 APR 13 2006

OFFICE OF THE CLERK

No. ——

In the Supreme Court of the United States

KRISTOPHER COURTNEY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

JAMES R. WILLIS
Counsel of Record

THE 113 ST. CLAIR BUILDING
113 ST. CLAIR AVENUE, N.E.
SUITE 530
CLEVELAND, OH 44114
(216) 523-1100
(216) 737-7412 FAX

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER A COURT IN DENYING A MOTION TO SUPPRESS CAN LITERALLY REJECT THE OFFICER'S CONCLUSION THAT THE MOTORIST, WHO HE DECIDED NOT TO TICKET, WAS NOT, IN HIS JUDGMENT, IMPAIRED AND FREE TO LEAVE, AND SUBSTITUTE THE COURT'S OWN OPINION THAT THERE WAS SOMETHING IMPAIRED ABOUT THE MOTORIST'S JUDGMENT, AND THUS HIS FURTHER DETENTION AND QUESTIONING WAS NOT ILLEGAL.

TABLE OF CONTENTS

PAGE

Questions Presented For Review i

Table of Authorities iv

Opinions Below 1

Statement Of The Grounds On Which The Jurisdiction Of This Court Is Invoked 1

Constitutional And Statutory Provisions 1

Statement Of The Case and Facts 3

Arguments Relied On For Allowance Of Writ 18

Argument No. I:

THE COURT'S DENIAL OF A MOTION TO SUPPRESS, IN WHICH IT SUBSTITUTED HIS ASSESSMENT OF THE "FACTS" FOR THOSE OF THE ARRESTING OFFICER, CANNOT SURVIVE MEANINGFUL SCRUTINY. 23

Conclusion 29

Appendix

Appendix "A" - Entry of The Supreme Court of Ohio, denying further Appellant review filed January 25, 2006 . . . . . 1a

Appendix "B" - Opinion of the Ohio Court of Appeals, Eighth Judicial District, date of journalization August 29, 2005 . . . . . 2a

Appendix "C" - Journal Entry of The Cuyahoga County Court of Common Pleas, filed September 16, 2004 . . . . . 12a

TABLE OF AUTHORITIES

PAGE

Florida v. Royer,
460 U.S. 491 (1983) 26

McDonald v. United States,
335 U.S. 451 (1948) 18

State v. Washington,
144 Ohio App. 3d 482 (8th Dist. 2001) 25

Terry v. Ohio,
392 U.S. 1 (1968) 20, 21, 25, 26, 29

United States v. Hill,
185 F. 3d 651 (6th Cir. 1999) 20

United States v. Jeffers,
342 U.S. 48 (1951) 18

United States v. Mendenhall,
446 U.S. 554 (1980) 21, 28

United States v. Patton,
183 F. 3d 1190 (10th Cir. 1999) 21

United States v. Wellman,
185 F. 3d 651 (6th Cir. 1999) 9, 20

United States v. Wilson,
953 F. 2d 116 (4th Cir. 1991) 26

RELEVANT RULES, CODES & OTHER AUTHORITIES:

Ohio Rules of Criminal Procedure, Rule 12(F) 3

Ohio Rules of Criminal Procedure, Rule 12(C)(3) 3

Revised Code of Ohio, §2923.12 3

Title 2, United States Code, §1257(3) 1

United States Constitution, Amendment IV 2

United States Constitution, Amendment V 2

United States Constitution, Amendment VI 2

United States Constitution, Amendment XIV 2

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioner, Kristopher Courtney, respectfully prays that a Writ of Certiorari issue to review the judgment of the Ohio Court of Appeals for the Eighth Judicial District, originally journalized in this case on **August 29, 2005**, and made final by order of the Ohio Supreme Court on **January 25, 2006**, when that Court denied further Appellate review.

OPINIONS BELOW

The Opinion of the Court of Appeals, affirming these convictions, is included in the *Appendix* as **Appendix "A"**. The Order of the Ohio Supreme Court is designated as **Appendix "B"**.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment by the Court of Appeals was finalized on **January 25, 2006**, when the Ohio Supreme Court denied further Appellate review. So postured, the jurisdiction of this Court is invoked under **Title 28 U.S.C. 1257 (3).**

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principal provisions of the United States Constitution involved in this case are the search and seizure clause of the Fourth Amendment and the self-incriminating clause of the Fifth Amendment. The pertinent text of these reads as follows:

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

> "No person ... shall be compelled in any criminal case to be a witness against himself...."

Amendment VI:

> "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State an district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment XIV:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The pertinent provisions of the **Ohio Rules of Criminal Procedure**, provides:

> **Rule 12(C)(3)**, which states: "Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial: . . . (3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the grounds that it was illegally obtained. Such motions shall be filed in the trial court only."
>
> **Rule 12(F)**, which states: "The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means."

The relevant statute herein, **Revised Code of Ohio, §2923.12** provides in pertinent part that:

> (A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:
>
> (1) A deadly weapon other than a handgun; . . .

STATEMENT OF THE CASE

Kristopher Courtney, the Petitioner, was arrested by two Shaker Heights, Ohio policemen. These officers admitted the search of his car occurred *after* he refused to give them his consent. The appeal to the Ohio Court of Appeals was lodged

in the wake of a reservation of the right to appeal the denial of a Motion to Suppress.

The facts show Officer Kerr, of the Shaker Heights Police Department, testified that he approached the Petitioner, whose car had stopped for a traffic signal, which according to the officer he was not required to stop for (**tr[1]., pp. 7-8**). Continuing, the witness testified:

> Q: So what happens next?
>
> A: We have a conversation about why he's stopped in the middle of the intersection. He said . . . he wanted to make sure he was following all the traffic laws, so that he didn't get stopped by the Shaker Heights police. I told him that I appreciated his efforts to do the right thing and stop at the red light, but that he was in violation. **And I told him that I was going to cut him a break on the red light ticket and let him go at that point**.
>
> Q: Now, doing what you've described, is that within your discretion as a police officer?
>
> A: Yes.

---

[1] The reference **Tr., p. _____**, is to the "Transcript of Proceeding" before the Cuyahoga County Common Pleas Court. This Transcript provided the trial Record centralized in the reviews had in the Court of Appeals and the Ohio Supreme Court.

Q: He was otherwise being cooperative with you?

A: Yes, he was very cooperative.

Q: So what happens next?

A: Patrolman Adkins rolls up to assist me on the traffic stop and I give Mr. Courtney his driver's license back and **I proceed to ask him if he has any drugs or guns or anything else illegal in the car**.

Q: Okay.

A: And he - - **when I asked him that question, he looks away from me, looks down, and says, "*No*."** . . .

Id., pp. 17-18. (Emphasis supplied.) Given this "**no**," the officer then testified that in his experience when people react a certain way to being asked if they will consent to a search, "it shows deception to . . . [him], which raises [in his mind] suspicion." **Id., p. 19**. Next, this officer says he then asked the other officer, who had arrived by then, to help him with this *traffic offense*, and "if he could smell anything coming out of the car." And, of course, it was said that he did (**id., p. 19**).

The Record shows the Petitioner was next forced out of his car at gun point. When the car was searched a gun was found in the car "under the driver's seat" (**id., p. 23**). Significant here, on cross-examination this officer provided the following, additional, critically important testimony:

Q: But you gave him back his license and **told him you were going to give him a break, and that meant he was free to go**?

A: **That's correct**.

Q: But then the other officer came along and the two of you decided to expand this stop into an investigation?

A: No.

Q: Well, you indicated that you asked him questions about whether or not he would consent to the search of his car.

A: Uh-huh.

Tr., pp. 26-27. (Emphasis supplied.)

Next, it should be noted that a highly significant, confirmatory, version of this factual pattern emerges from the officer's pointed responses to questions put to him by the Judge:

THE COURT: Yes. **What then caused you to say, well, you're going to let him go**?

THE WITNESS: He didn't act - - he was very cooperative. He wasn't slurring his speech. He . . . **just didn't act like he was intoxicated to me. He didn't seem like there**